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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 364.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, AND C. W. MCDONNELL, FAY HARDING AND BEN C. LARKIN AS MEMBERS OF AND CONSTITUTING SAID BOARD, AND JAMES MORRIS AS ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA,
Appellants.

vs.

GREAT NORTHERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, AND FARMERS GRAIN AND SHIPPING COMPANY, *Appellees.*

BRIEF OF PUBLIC SERVICE COMMISSION OF ALABAMA, ET AL., AMICI CURIAE.

For the Regulatory Commissions of Thirty-seven States.

JOHN E. BENTON,
602-606 Otis Building,
Washington, D. C.

March 10, 1930.

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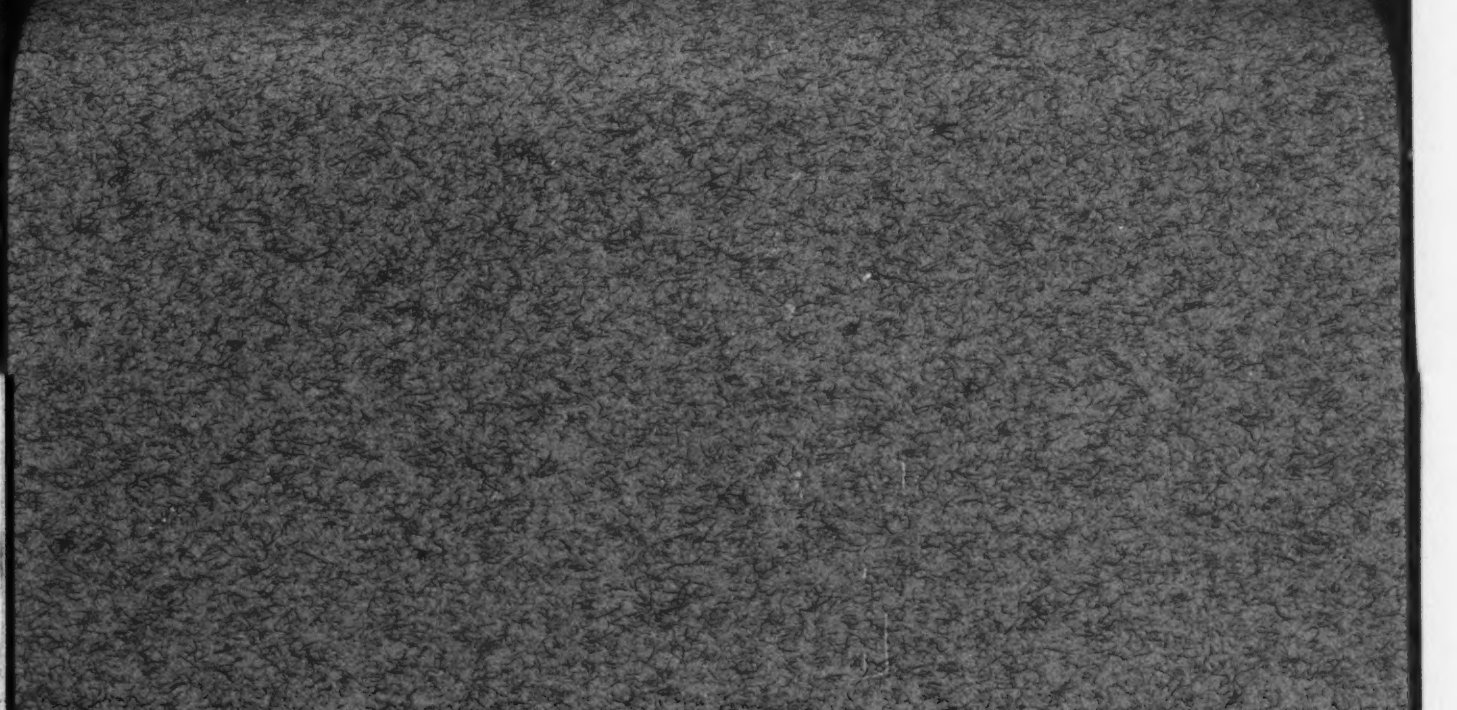

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BRIEF OF PUBLIC SERVICE COMMISSION OF ALABAMA, ET AL., AMICI CURIAE.

This brief is filed on behalf of the states of Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri,

Montana, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, by their regulatory commissions signatories hereto.

REFERENCE TO OPINION BELOW.

The opinion below, in the United States District Court for the District of North Dakota, is reported *Great Northern Ry. Co. et al. v. Board of Railroad Commissioners of State of North Dakota, et al.*, 33 Fed. 2d Series, 934.

STATEMENT OF FACTS.

The statement of facts contained in the brief of the appellants is accepted by the commissions which are parties to this brief.

ARGUMENT.

The Pendency of a Proceeding Before the Interstate Commerce Commission Under the Hoch-Smith Resolution, the Decision in which May Affect Intrastate Rates, Does Not Give the Court Jurisdiction to Enjoin Changes in Those Rates.

This brief will be devoted solely to argument of the proposition just stated.

The commissions joining herein desire to urge upon the Court that if the injunction below shall be sustained the destruction of state power to regulate intrastate rates will be complete.

The court below granted the injunction solely upon the ground that the existing intrastate rates in North Dakota, which would be changed by putting into effect

the rates covered by the injunction, are involved in the *Rate Structure Investigation,* I. C. C. No. 17,000. The order of investigation in that case (which is set forth in full at page 14 of appellants' brief) involves all railroad rates, interstate and intrastate, in the United States. If the pendency of that proceeding is ground for the injunction granted in this case, it would be ground for a like injunction to prevent the rate-making authorities of any state from effecting any change in any intrastate rates whatsoever.

The *Rate Structure Investigation,* No. 17,000, was instituted in obedience to the Hoch-Smith Resolution (S. J. Res. 107, 68th Congress, approved January 30, 1925). That resolution directed the Commission "to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential * * * and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist." The resolution did not extend the jurisdiction or increase the power of the Commission. It required a general survey of the rate structure and the making of such changes "in accordance with law" as the Commission should find necessary to remedy defects either of unreasonableness or of discrimination. In the exercise of its power to require the removal of undue discriminations, the Commission might change intrastate rates, and hence the investigation extended to such rates, but with respect to them the Commission was to exercise no new powers.

The reasoning upon which the injunction below was based does not very clearly appear from the opinion. It does appear, however, that the court granted the injunction to preserve the status of the rates under investigation. This is what the court said:

> "We do not pass upon the question as to whether the mere fact that a controversy exists between a carrier and a state rate-making body as to the validity of an intrastate rate alleged to discriminate against interstate commerce, justifies an injunction such as prayed for here, or whether a carrier may, by commencing a proceeding before the Interstate Commerce Commission to test the validity of an intrastate rate under Section 13 of the Interstate Commerce Act, after an order has been made by a state commission fixing such rate, properly call for injunctive relief. Our opinion is, however, that, under the circumstances of this case, this Court can and should *for the purpose of preserving the status quo until such time as the Interstate Commerce Commission may complete its investigation and file its decision in Docket No. 17,000,* grant an interlocutory injunction." (R. 87) (Italics ours)

The fundamental question is whether intrastate rates continue subject to the regulation of the states, inasmuch as the rates could not be properly enjoined if they were lawfully prescribed.

This is not a new question. Upon the fullest review of the authorities this Court has held that power to regulate intrastate rates was reserved to the states by the federal constitution, subject only to such restriction upon its exercise as may result from the exercise by the Congress of the power granted to it to regulate interstate and foreign commerce under the Commerce

Clause of the Constitution. *Minnesota Rate Cases*, 230 U. S. 352.

This power of the Congress to regulate includes the power to protect; and Congress has exercised the power by forbidding discriminatory rates, either interstate or intrastate. *Houston E. & W. Tex. Ry. v. U. S.*, 234 U. S. 342. But the question whether rates are or not discriminatory is not a question for the courts. Congress has committed that question to the Interstate Commerce Commission, and in the absence of a determination by that Commission no court may enjoin rates upon the ground of alleged discrimination. *Minnesota Rate Cases*, 230 U. S. 352, 419; *Great Northern Railroad v. Merchants Elevator Co.*, 259 U. S. 291.

By Transportation Act, 1920, Congress broadened the inhibition against unduly discriminatory rates to include rates so unduly low as to yield inadequate compensation to carriers for the transportation service covered by such rates. But the jurisdiction of the states over intrastate rates was not otherwise affected. No uniform control over all rates was created. So far as intrastate rates are concerned, the Interstate Commerce Commission was given power to control the same only to the extent of removing discriminations which might operate as a real discrimination against and obstruction to interstate commerce. It was not given power to exercise general regulation of intrastate commerce. *Wisconsin Railroad Commission v. C. B. & Q. R. R.*, 257 U. S. 563. The question of discrimination remains still a question for the Commission and not for the courts. *Great Northern Railroad v. Merchants Elevator Co.*, 259 U. S. 291.

No claim is made in this case that the rates enjoined

are confiscatory, and the court below expressly disclaimed any finding of its own as to the lawfulness or the unlawfulness of the rates enjoined, saying: "That question is before the Interstate Commerce Commission and it alone has jurisdiction to determine it. It may find that the State Board was well within its rights in doing what was done, or it may find to the contrary."

The rates, then, were enjoined only for the purpose, as we have before said, of maintaining the existing status till the Interstate Commerce Commission should make its decision as to class rates in *Rate Structure Investigation*, No. 17,000.

Under the decisions which have been cited, it would seem clear that the injunction sought to be set aside was beyond the power of the court unless something may be found in the Hoch-Smith Resolution restricting the jurisdiction of the states over intrastate rates, and operating to empower the court to grant that injunction.

The Hoch-Smith Resolution is set forth in full, in the appellants' brief, beginning at page 14. Examination of it will show that, aside from its directions as to agricultural rates, which need not be here discussed, it lays no new injunction upon the carriers, and confers no additional power upon the Interstate Commerce Commission.

It may be conceded that the direction to the Commission to remove undue discriminations extended to discriminations created by intrastate rates. It may furthermore be conceded that it would be more "orderly" procedure if no changes should be made in any rates, interstate or intrastate, while the survey ordered by the Hoch-Smith Resolution is in progress.

But the question here,—disregarding any question of the constitutional power of Congress,—is whether Congress in the resolution has suspended the accustomed rate-making power of the states, or has empowered the court to suspend the exercise of that power.

There is in the resolution certainly no express provision in any way restricting the exercise of the rate-making power of the states; and there is no provision from which any intent to suspend that power may be implied.

If it be argued that the rate structure should remain unchanged while the investigation directed by the resolution is in progress so that the same may be completed as early as shall be possible, and that accordingly it must be concluded that Congress by the resolution intended to inhibit rate changes during the progress of the investigation, it may be said in reply that it is not necessary that the rate structure shall remain unchanged in order that the investigation may be expeditiously determined. The Interstate Commerce Commission may determine what rates in existence when the resolution was adopted were discriminatory, and what rates should now be made effective in place of those rates, regardless of intervening changes.

It may also be pointed out that if the resolution operates to prevent state authorities from making rate changes it must likewise operate in the same way to prevent voluntary changes by the carriers themselves, since voluntary changes would be just as prejudicial to "orderly" procedure as changes made by compulsion of state law. But disability on the part of state rate-making authorities and of the carriers to make changes

in rates would result in an intolerable situation, which Congress could not have contemplated.

The power of the railroads and of state authorities to change intrastate rates being suspended, there would be no power which could make necessary changes in intrastate rate structures during the pendency of No. 17,000. The Interstate Commerce Commission itself could not make such changes, since its power extends only to the removal of discriminations against interstate commerce. *Mutual Creamery Co. v. American Express Co.*, 132 I. C. C. 207, 210; *Illinois Coal Cases*, 62 I. C. C. 741, 743. Rate structures would be frozen, and changes in rates which are often called for by the exigencies of business could in no way be met.

The Hoch-Smith Resolution was adopted more than five years ago, and the No. 17,000 investigation was instituted by the Interstate Commerce Commission on March 12, 1925. How many more years will elapse before the investigation is ended no man can tell. Adopting language of this Court from the *Minnesota Rate Cases* opinion, "It can not be supposed that Congress * * * attempted to override the accustomed authority of the states without the provision of a substitute." And certainly it would not have destroyed the power of existing rate regulatory authorities and at the same time the power of the carriers themselves to make necessary changes in rates as need for the same should arise.

The Hoch-Smith Resolution from the first has been regarded as not interfering with the rate-making power of the carriers and of the states. The carriers have continued to institute rate changes, in conformity with the law, at will, both interstate and intrastate; and

the state commissions generally have continued to make rate orders. *Alabama Public Service Commission v. L. & N. R. R. Co., et al.*, 39 Alabama Public Service Commission Reports, 283, November 9, 1928; *In Re: Carload and Less Than Carload Rates on Fertilizer Between Points in the State of Florida*, 31st Annual Report Florida Railroad Commission, p. 93, May 10, 1927; *In Re: General Revision of Rates on Iron and Steel Articles Carload and Less Carload Between Points Within State of Georgia*, 53rd and 54th Annual Report Georgia Public Service Commission, p. 112, December 15, 1926; *In Re Rates of Common Carriers by Railroad on Coal and Coke*, 21st Annual Report of the Corporation Commission of Oklahoma, p. 365, July 25, 1925; *Cattle and Horse Raisers Association of Oregon, et al v. Southern Pacific Co.*, 29th Annual Report of the Public Service Commission of Oregon, May 24, 1926; *C. T. Kuhns & Son, et al vs. Central Railroad of New Jersey*, Order 2272—Complaint Docket 7869, Public Service Commission of Pennsylvania, July 9, 1929; *In the Matter of Rates for the Transportation of Crushed Stone from Hellams, S. C., to Points on the Southern Railway Within South Carolina*, 50th Annual Report of Railroad Commission of South Carolina, p. 19-A, January 25, 1928; *Pfaff & Smith Builders Supply Co. et al. vs. The C. & O. Ry. Co.*, Vol. 2—Decisions West Virginia Public Service Commission 1922-1928, p. 672, April 3, 1928.

The commissions filing this brief argue that the injunction below disregards the cooperative provisions of the Interstate Commerce Act, and the cooperative agreement between the Interstate Commerce Commission and the state commissions made conformably to those provisions.

This Court in the *Wisconsin Passenger Fare Case* suggested a course whereby the rate-making power of the states, in cases where federal orders prescribing rates had been made, might be restored to the states, leaving to the state commissions power to deal with intrastate rates and increase them or reduce them in their discretion (257 U. S. 590). Acting in conformity with this suggestion, the federal and state commissions in May, 1922, adopted a cooperative agreement which was reported by the Interstate Commerce Commission to Congress in its annual report filed December 1, 1922, at page 8. The record in this case discloses that the North Dakota Commission has fully recognized the obligation of that state to maintain a proportionate and equitable share of the income of the carriers from intrastate traffic. The record discloses also that the North Dakota Commission is cooperating with the Interstate Commerce Commission, and that the order prescribing the rates covered by the injunction below expressly provided that the same was without prejudice to different conclusions which might be reached in the cooperative proceedings now pending jointly before the Interstate Commerce Commission in No. 17,000. The purpose of the North Dakota Commission to conform its rates to the rate structure finally established by the Interstate Commerce Commission is evident.

The state commissions most respectfully urge that the primary jurisdiction of the states over intrastate rates, subject to the supervisory power of the Interstate Commerce Commission, has heretofore been clearly recognized by this Court, and that the operation of state laws and state regulatory agencies in the exercise of their power should not be impeded by injunctions such as is here sought to be set aside.

ADOPTION OF APPELLANTS' BRIEF.

The commissions filing this brief refrain from extending the same, and adopt as their own the argument made by the Appellants in their brief heretofore filed herein.

Respectfully submitted,

ALABAMA PUBLIC SERVICE COMMISSION
By Hugh White, President.
ARIZONA CORPORATION COMMISSION
By Loren Vaughn, Chairman.
ARKANSAS RAILROAD COMMISSION
By Clay S. Henderson, Chairman.
RAILROAD COMMISSION OF CALIFORNIA
By Arthur T. George, Attorney.
PUBLIC UTILITIES COMMISSION OF COLORADO
By Otto Bock, Chairman.
RAILROAD COMMISSION OF FLORIDA
By A. S. Wells, Chairman.
GEORGIA PUBLIC SERVICE COMMISSION
By James A. Perry, Chairman.
PUBLIC UTILITIES COMMISSION OF IDAHO
By Frank E. Smith, President.
ILLINOIS COMMERCE COMMISSION
By Charles E. Hadley, Chairman.
BOARD OF RAILROAD COMMISSIONERS OF IOWA
By J. H. Henderson, Commerce Counsel.
PUBLIC SERVICE COMMISSION OF KANSAS
By Walter F. Jones, General Attorney.

KENTUCKY RAILROAD COMMISSION
By Moses R. Glenn, Chairman.
LOUISIANA PUBLIC SERVICE COMMISSION
By Francis Williams, Chairman.
PUBLIC UTILITIES COMMISSION OF MAINE
By Albert J. Stearns, Chairman.
PUBLIC SERVICE COMMISSION OF MARYLAND
By Harold E. West, Chairman.

MISSISSIPPI RAILROAD COMMISSION
By C. M. Morgan, President.
PUBLIC SERVICE COMMISSION OF MISSOURI
By D. D. McDonald, General Counsel.
BOARD OF RAILROAD COMMISSIONERS OF MONTANA
By Francis A. Silver, Counsel.
STATE RAILWAY COMMISSION OF NEBRASKA
By Hugh LaMaster, Assistant Attorney General.
PUBLIC SERVICE COMMISSION OF NEVADA
By John F. Shaughnessy, Chairman.
STATE CORPORATION COMMISSION OF NEW MEXICO
By Max Fernandez, Chairman.
CORPORATION COMMISSION OF NORTH CAROLINA
By I. M. Bailey, Counsel.

PUBLIC UTILITIES COMMISSION OF OHIO
By Thomas J. Herbert, Attorney.
CORPORATION COMMISSION OF OKLAHOMA
By PAUL A. WALKER, Counsel.
PUBLIC SERVICE COMMISSION OF OREGON
By Frank J. Miller, Chairman.
PUBLIC SERVICE COMMISSION OF PENNSYLVANIA
By John Fox Weiss, Counsel.
RAILROAD COMMISSION OF SOUTH CAROLINA
By Sam C. Blease, Chairman.
BOARD OF RAILROAD COMMISSIONERS OF SOUTH DAKOTA
By Herman L. Bode, Counsel.

RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE
By Harvey H. Hannah, Chairman.
RAILROAD COMMISSION OF TEXAS
By Pat M. Neff, Chairman.

PUBLIC UTILITIES COMMISSION OF UTAH
By E. E. Corfman, President.
PUBLIC SERVICE COMMISSION OF VERMONT
By Henry B. Shaw, Chairman.
STATE CORPORATION COMMISSION OF VIRGINIA
By H. E. Ketner, Commerce Counsel.

DEPARTMENT OF PUBLIC WORKS OF WASHINGTON
By Fred K. Baker, Director.
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
By I. Wade Coffman, Chairman.
RAILROAD COMMISSION OF WISCONSIN
By Lewis E. Gettle, Chairman.
PUBLIC SERVICE COMMISSION OF WYOMING
By Claude L. Draper, Chairman.

JOHN E. BENTON,
Attorney for all said Commissions
602-606 Otis Building,
Washington, D. C.

March 10, 1930.

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